(9)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
and SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE [1]

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty and older. More than eleven million AARP members are employed, many of whom are covered by employer health insurance plans. Approximately sixteen million AARP members are under age 65, and generally not eligible for Medicare.

Since AARP was founded in 1958, access to health care has been a major Association priority. AARP is com-

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[1] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

mitted to ensuring that persons of all ages have access to adequate health care coverage.

Health insurance is essential to the well-being and financial security of workers and their families. Older persons typically take longer than younger persons to recover from certain injuries and illnesses. A number of illnesses that require extensive treatment occur more frequently in the older population than in the younger population. In addition, older persons are often foreclosed from obtaining adequate and affordable health insurance, particularly when they have preexisting conditions.

Older persons face significant risks from employment policies that fail to provide continued coverage to injured employees, their spouses and dependents. The loss of employer-provided health insurance when an employee receives workers' compensation can have disastrous consequences not only for that employee, but also for the employee's family. AARP is concerned that ERISA not be construed to defeat the continuation of health insurance for injured employees, particularly when Congress exempted workers' compensation laws from ERISA coverage.

Health insurance coverage is an extremely valuable and integral component of an employee's total compensation,[2] particularly for an older worker. While the purpose of workers' compensation is to provide an adequate replacement of the employee's prior earnings, the ruling

[2] In a 1991 Gallup survey of 1,000 individuals covered by an employer health plan, 65% of the respondents said health insurance is the most important employee benefit. Pensions were named as the second most important employee benefit by 35% of respondents. *See* Employee Benefits Research Institute, *Public Attitudes on the Value of Benefits* (1991). Respondents who were covered by an employer health plan (70% of all respondents) said the average amount of additional pay they would need in order to give up the benefit was $4,096. *Id.*

below effectively prevents the states from recognizing the value of health insurance coverage as part of overall compensation. In so doing, it impedes the objective of workers' compensation laws and jeopardizes the health and financial security of all workers and their families.

SUMMARY OF ARGUMENT

Since the start of this century, workers' compensation laws have been the domain of the state legislatures. In enacting ERISA[3] and other federal legislation, Congress has sought not to impinge upon the states' authority to enact adequate remedies for work-related injuries and diseases. The only exceptions have come when Congress has enacted comprehensive federal legislation for certain classes of workers, such as railroad employees, seamen, longshoremen, government employees, and members of the armed forces.

ERISA Section 514(a), 29 U.S.C. § 1144(a), should not preempt the District of Columbia's Workers' Compensation law merely because it, in part, measures a worker's loss of earning power by the health insurance coverage that he or she was entitled to at the time of the injury. Neither ERISA's plain language nor its legislative history support preemption based on the measure of a remedy. Far from being preempted by ERISA, the District's provision carries out the main purpose of workers' compensation programs that Congress sought to exempt from ERISA, namely replacing the lost earning power of injured workers. It is difficult, indeed, to imagine how states can measure the lost earnings represented by an injured worker's health benefits without referring to the cost of the insurance coverage the worker had before the injury.

Moreover, if ERISA Section 514 was held to preempt state law claims that provide for the recovery of lost

[3] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

benefits, then the entire spectrum of claims and remedies that refer to existing benefits would be subject to ERISA preemption, such as state law remedies for wrongful discharge, discrimination, and even for personal injuries, as well as state law rules for the plans covered under each of the other exemptions described in ERISA Section 4(b), 29 U.S.C. § 1003(b). Surely, Congress never intended ERISA to preclude such a vast array of state law claims or remedies.

INTRODUCTION

Starting with New York's 1910 compensation statute, every state enacted workers' compensation statutes as "compromise systems" to resolve and redress the loss of earning power resulting from workplace injuries and diseases. L. Friedman, *A History of American Law* (2d ed. 1985), at 484 and 682-84. Under these statutes, "[e]mployers relinquish[] their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office Workers' Comp. Programs*, 461 U.S. 624, 636 (1983) (describing balance struck between concerns of employers and workers under 1927 Longshoremen's and Harbor Workers Act).

Workers' compensation statutes typically set benefits for injured employees by reference to a percentage of the compensation that the employee was receiving prior to suffering the injury. 2 A. Larson, *Law of Workmen's Compensation*, § 60.00. That percentage varies between 50 and 66⅔ percent. *Id.* In the District of Columbia, the workers' compensation law provides 66⅔ percent of the employee's average weekly wage at the time of the injury for total disability. D.C. Code Ann. §§ 36-308, 36-311.[4] Medical expenses of the injured employee that

[4] If a worker permanently loses the use of part of his or her body, a fixed schedule of payments applies. In the District of Columbia, for example, 200 weeks of compensation is awarded for the permanent loss of hearing in both ears. D.C. Code Ann. § 36-308.

result from the injury are also required to be paid. D.C. Code Ann. § 36-307(a).

In the District, as in the states, the statutory compensation constitutes the *exclusive* remedy available to employees to redress work-related injuries and death. Injured workers are not allowed to draw workers' compensation and then institute separate lawsuits against the employer to secure additional benefits or damages to round out the compensation that the state has afforded them. D.C. Code Ann. § 36-304; *see, e.g., Myco, Inc. v. Super Concrete Co.*, 565 A.2d 293, 296 (D.C. 1989).

I. HEALTH INSURANCE COVERAGE IS AN INTEGRAL PART OF AN INJURED EMPLOYEE'S COMPENSATION.

Employers pay an ever-increasing portion of total compensation to employees in the form of benefits that are in addition to the base hourly, biweekly or monthly rate of pay.[5] Both employees[6] and employers[7] cite health insurance as the most important employee benefit within the compensation package. The primary benefits are health insurance, pension and/or savings plans, paid vacation and sick leave, group term life insurance, and severance pay. Between 1950 and 1990, the percentage of compensation provided through benefits (including the employee portion of Social Security) increased from under 10 percent to over 27 percent of payroll. *See* Wiatrowski, *Family-Related Benefits in the Workplace*, 113 Monthly

[5] Employee benefits typically represent between twenty to thirty per cent of an employee's compensation. *Employee Benefits for American Workers*, Research Rep. No. 89-09, The National Commission for Employment Policy, 1 (June 1990).

[6] *See, e.g.*, note 2, *supra*.

[7] General Accounting Office, *Workforce Issues: Employment Practices in Selected Large Private Companies* (1991).

Lab. Rev. 28, 32 (1990), and Chen, *The Growth of Fringe Benefits*, 104 Monthly Lab. Rev. 3, 5 (1981) (cited in *Morrison-Knudsen Constr. Co.*, 461 U.S. at 636).

Because workers' compensation statutes are exclusive, it is essential that states have the power to enact statutes that provide *adequate* compensatory remedies for a worker's injury and lost earning capacity. To the extent workers' compensation statutes ignore the benefit component of compensation and remain rooted in pre-World War II compensation methods, they provide inadequate replacement compensation for employees whose remuneration is heavily weighted in favor of such benefits. The 1972 *Report of the National Commission on State Workmen's Compensation Laws* thus found:

> "Because workmen's compensation benefits usually are tied solely to earnings, the program is increasingly deficient in the protection provided to the remuneration [including benefits] of American workers."

Id., at 54; *see also* 36-37.

While it is far from the predominant method, six states include the value of certain benefits in the wage bases that are used in calculating workers' compensation awards. *See* 2 A. Larson, *Law of Workmen's Compensation*, § 60.12 (1991 Cum. Suppl.) (citing Alabama, Alaska, Colorado, Florida, Kansas, and Maine).[8] In five additional states and three of the same ones, the level of compensation is set at a higher level, but the employer is allowed to *offset* the value of certain benefits against the worker's compensation award. *Id.*, at vol. 4, § 97.51(b)

[8] Cf. *Morrison-Knudsen Constr. Co. v. Director, Office Workers' Comp. Programs*, 461 U.S. 624, 632 (1983) (Congress did not intend to include fringe benefits in "wages" when it enacted statute that later became the District of Columbia Workmen's Compensation Act; if statute is to be altered to include fringe benefits within definition, it is the legislature's task).

and App. B-18A-1 (citing Alaska, Colorado, District of Columbia, Maine, Michigan and Ohio); *see also* U.S. Chamber of Commerce, *1992 Analysis of Workers' Compensation Laws*, at 18-21 (citing same states plus Louisiana and Massachusetts). For example, the District of Columbia has an offset from the worker's compensation award if benefits received from "employee benefit plans subject to [ERISA]" and from Social Security exceed 80 percent of the compensation award. D.C. Code Ann. § 36-308(9).[9]

With the enactment of the 1990 Equity Amendments Act, the District of Columbia followed the State of Connecticut in taking benefits into account in providing remedies for workplace injuries in an innovative way. The District, like Connecticut, offered injured employees a remedy that includes the cost of health insurance coverage for a period up to 52 weeks. Under the 1990 EAA, employers are required to pay the cost of health insurance coverage equivalent to that which the injured employee possessed before the injury. D.C. Code Ann. § 36-307 (a-1).

The EAA was a substantial, but not radical, departure from existing law. Like all of the states, the District requires the employer to pay the medical expenses of the injured employee that result from the injury. D.C. Code Ann. § 36-307(a). This coverage accounts for 39 percent of all workers' compensation expenditures. U.S. Chamber of Commerce, *1992 Analysis of Workers' Compensation Laws*, viii; *see also* 2 A. Larson, *Law of Workmen's Compensation*, § 61.00 (one-third of expenditures for medical coverage in 1961 study). Effectively, the Equity Amendments Act added the cost of continuing the coverage the

[9] The decision this term in *General Motors Corp. v. Romein*, 60 U.S.L.W. 4203 (March 9, 1992), concerned whether the Michigan statute allowing workers' compensation awards to be coordinated with employer-funded pension and disability benefits was retroactive.

employee had prior to his injury, *i.e.*, the cost for medical expenses not related to the injury and coverage of the spouse and dependents for a period of up to 52 weeks.

II. THE DISTRICT'S WORKERS' COMPENSATION PROGRAM IS EXEMPT FROM ERISA PREEMPTION UNDER *SHAW v. DELTA AIR LINES.*

When Congress enacted ERISA in 1974, it did not manifest any intention to impinge upon the states' ability to enact adequate remedies for work-related injuries. Under ERISA Section 514, Congress provided that ERISA preempts state laws that "relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a). Benefit plans that are "exempt under section 4(b)" include plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b). Hence, Congress intended that state laws that "relate to an[] employee benefit plan" that is "maintained solely for the purpose of complying with applicable workmen's compensation laws" would *not* be preempted.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983), this Court held that Section 514(a) does not preempt laws requiring insurance plans to include certain benefits as long as the employer has the option of providing the benefit under an ERISA plan. Because the EAA provides such an option to employers, it is not preempted by ERISA.

Employers satisfy the District's Workers' Compensation law by purchasing insurance from a workers' compensation insurance carrier. D.C. Code Ann. § 36-334. Employers can also self-fund their workers' compensation program if they meet certain requirements that prove their financial ability to pay. *Id.* The 1990 EAA directs employers to provide the required "health insurance coverage" as a part of the employer's workers' compensation

program. As with the other workers' compensation benefits, the employer must provide this coverage through an insurance carrier unless it meets the requirements for self-funding. *Id.*

The 1990 EAA does *not* require an employer to include the injured employees under its ERISA health plan or to alter the ERISA plan in any manner; it merely requires that the employer pay the cost of equivalent insurance coverage for injured employees.[10] If the employer chooses, it can provide the equivalent health insurance coverage by continuing to include the employee under its ERISA health plan. However, the statute does not require, or encourage, employers to use that mechanism.[11]

In the *Greater Washington Board of Trade* decision (hereafter "*GWBT*"), the U.S. Court of Appeals for the District of Columbia acknowledged that *Shaw* permits state workers' compensation laws to require minimum health benefits as a part of an injured worker's compensation without running into ERISA preemption. 948 F.2d 1317, 1323 (D.C. Cir. 1991). The D.C. Circuit's opinion thus concludes:

> Had the Equity Amendment Act . . . simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation—it would clearly have survived preemption under the principles announced in *Shaw*.

948 F.2d at 1323. The Respondent Board of Trade agrees, as stated in its opposition to *certiorari*, that "[i]f . . . the state mandated health benefits for injured workers which

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[10] The employer is reimbursed for the entire cost of this coverage at the end of the year from a D.C. Special Fund. D.C. Code Ann. § 36-307(a-1)(5). The Special Fund, in turn, assesses both workers' compensation insurers and employers who self-fund their programs. D.C. Code Ann. § 36-340. The cost of the insurance is thus ultimately borne by employers.

[11] Indeed, the rules on self-funding preclude the employer from using a self-funded ERISA plan to provide this coverage unless the employer meets the financial ability requirements.

were not tied to the employer's health insurance . . . , then the Second Circuit's decision [in *Donnelley*] would have been correct." Opp. to Cert. Petition, at 6; *see also id.* at 9, 11.[12]

III. ERISA SECTION 514 DOES NOT PREVENT THE CALCUATION OF REMEDIES FOR LOST COMPENSATION BY REFERENCE TO EXISTING BENEFITS.

As discussed immediately above, no one questions the District's authority to mandate that employers provide health insurance coverage as one of the remedies for work-related injury or disease. Thus, the D.C. and Second Circuits, and the parties, actually diverge on only *one* issue: Can the District of Columbia (or a state) determine which injured workers are to receive this remedy and measure its cost by looking to the health insurance coverage the worker possessed before his or her injury?

The D.C. Circuit identified the critical difference between its opinion and the Second Circuit's decision in *R.R. Donnelley & Sons, Co. v. Prevost*, in that *Donnelley*:

> [F]ocused on only half the story. [T]he court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by *tying the new benefits to existing benefits* and by *limiting the law's applicability to employers already providing benefits through ERISA plans.*

948 F.2d at 1324 (emphasis added). The D.C. Circuit concluded that the EAA's "tying the new benefits to existing benefits" caused it to impermissibly "relate to" employee benefit plans covered under ERISA. *Id; see also* 948 F.2d at 1322 (EAA relates to ERISA plans "by requiring that the new benefits be 'equivalent' to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefit as those who already provide benefits under a covered plan"). As the Board of Trade describes it, the "critical fact," for the purpose of ERISA preemption was that the workers' compensation law *"triggers and indeed measures* the required health benefit level by the employer's health insurance." Opp. to Cert. Petition, at 6 (emphasis added).

With respect, the D.C. Circuit's decision would take the ERISA Section 514(a) "relates to" language in an unintended direction that unduly impairs the Section 4(b) exemption for workers' compensation plans. Indeed, the point that the *GWBT* decision objects to—the EAA's "tying the new benefits to existing benefits"—is the main function that workers' compensation laws are enacted to carry out. How else is a state to replace an injured employee's lost remuneration than by referring to the benefits he or she had at the time of the injury?

Martori Bros. Dist., Inc. v. James-Massengale, 781 F.2d 1349, 1358-59 (9th Cir. 1986), *modified*, 791 F.2d 799, *cert. denied*, 479 U.S. 949, 1018 (1986), may best illustrate why the D.C. Circuit's interpretation of the "relates to" language in ERISA Section 514 is inconsistent with ERISA's preemptive purposes. In *Martori*, the California agricultural labor board provided a remedy for an employer's unfair labor practices that included the cost of certain benefits as part of the remedy. Like the Board of Trade, the employer challenged the remedial order by arguing that ERISA preempted any remedy that is tied to the benefits provided under ERISA plans. The Ninth Circuit rejected this argument, finding that the state's "make-whole orders do not require any change whatsoever in existing ERISA plans" and holding that

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[12] Universal coverage—requiring all employers to provide specified minimum health benefits—is clearly preferable from the standpoint of the injured employees. But one can readily imagine the outcry from business associations, such as the Board of Trade, if the District's Council had proposed that workers' compensation include the cost of health insurance coverage *even if* the employer did not offer such coverage to its uninjured workers.

"ERISA [Section 514] does not prevent the calculation of damages for lost compensation by reference to existing ERISA plans." The Ninth Circuit observed that the expansive reading that the employer proposed would lead to "absurd" results, such as finding ERISA preemption in personal injury suits when the damages include loss of benefits under ERISA plans.

Every other court that has examined the question has reached the same conclusion as *Martori*: ERISA does not preempt a state law law because it measures a remedy for an unlawful act by an employee's existing benefits. For example, in *Teper v. Park West Galleries, Inc.*, 431 Mich. 225, 427 N.W.2d 535, 541 (Mich. 1988), an employer maintained that ERISA preempted a state law action for wrongful discharge because the damages that the employee sought were in part measured by the value of benefits that had been lost. The Supreme Court of Michigan held that an award can include damages that represent the cost of future benefits without being preempted by ERISA. *See also Schultz v. Nat'l Coalition of Hispanic Mental Health Organizations*, 678 F. Supp. 936, 938 (D.D.C. 1988) (damages for discharge in violation of District's Human Rights Act may include lost benefits without becoming an ERISA case); *Jaskilka v. Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (D. Conn. 1991) (damages for breach of employment contract can include value of lost benefits).

Here, the case against preemption is even stronger because Congress expressly exempted the workers' compensation remedies that the states require employers to provide. If the state law remedies furnished to the employees in *Martori* and *Teper* do not "relate to" employee benefit plans—even though no exemption appears in ERISA to preserve those state law remedies—then, *a fortiori*, the state law worker's compensation remedy here —which is protected by ERISA Section 4(b)—should not be preempted.

The *GWBT* decision should be reversed because it cannot logically be confined to its narrow facts. As just one example of its expansiveness, if the District's reference to existing "health insurance coverage" results in preemption, then the District's express offset for benefits received from "employee benefit plans subject to the Employee Retirement Income Security Act of 1974"—a provision that the Board of Trade has not challenged—would also be preempted. *See* D.C. Code Ann. § 36-308(9). Similarly, even the definitions of "wages" in the state workers' compensation law that include certain benefits would be preempted.

If the *GWBT* decision were to be affirmed, all of the other ERISA Section 4 exemptions that Congress crafted —for government and church plans, plans maintained outside of the U.S. primarily for nonresident aliens, and excess benefit plans—would also be impaired. For example, an "excess benefit" plan that is exempt under ERISA Section 4(b)(5) may offer a corporate executive 70 percent of final average salary less the pension benefit already furnished under the covered ERISA plan. If the *GWBT* decision were upheld, that offset would be preempted because it "relates to" the existing ERISA plan. Indeed, if *GWBT* was applied, the excess benefit plan exemption would be virtually wiped out of the statute. This is because ERISA Section 3(36), 29 U.S.C. § 1002(36), *defines* an excess benefit plan as a plan that provides benefits for "certain employees" that are in "excess of" the benefits offered to the employee under tax-qualified ERISA plans. *See also* J. Mamorsky, *Employee Benefits Law*, at 5-15 (3d ed. 1991).[13]

[13] Likewise, if a government plan exempt under Section 4(b)(1) says that certain health benefits are contingent on whether the worker or the spouse receives benefits under other employer-provided coverage, including from ERISA plans, the *GWBT* decision would preempt that language from the ostensibly "exempted" government health plan.

On examination of these consequences, it is clear that the Second Circuit's decision in *R.R. Donnelley & Sons, Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), did not "fail[] to appreciate" this "half [of] the story." Instead, like the Ninth Circuit in *Martori* (but with a different rationale), the Second Circuit drew the line under Section 514(a) in a manner that protects ERISA plans from state regulation, but does not wreak havoc on workers' compensation programs that Congress sought to exempt from ERISA's preemption.

In *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983), the Second Circuit had found that an earlier version of Connecticut's workers' compensation statute was preempted when it required employers to alter their ERISA health plans to include injured employees. But in *Donnelley*, the Second Circuit held that Connecticut's new statute fell within the Section 4(b) exemption when it merely directed employers to provide injured workers with coverage under the workers' compensation program and did not require the employer to alter the ERISA plan. 915 F.2d at 793. The Second Circuit thus preserved the important policies that the Section 4(b) exemption for workers' compensation plans was designed to protect while remaining consistent with Section 514(a)'s aims in regard to protecting ERISA plans from state regulation.[14]

Finally, the D.C. Circuit decision erred in stating that the EAA "limited the law's applicability to employers already providing benefits through *ERISA plans*." 948 F.2d at 1324 (emphasis added); *see also id.* at 1323 (the

[14] *Accord Richardson v. Lahood & Assoc., Inc.*, 571 So.2d 1082, 1086 (Ala. 1990) (ERISA does not preempt state workers' compensation statute prohibiting attachment or garnishment of such benefits for the repayment of any debt, including to an employee benefit plan, even though *Alessi* would preempt the statute if it prohibited ERISA plans from reducing their benefits by the amount of a worker's compensation award).

EAA "would clearly have survived preemption" had it "made no reference to existing ERISA-covered plans"). In fact, the EAA contains no reference to "ERISA plans," nor is its applicability "limited" to ERISA plans. The Act refers to "health insurance coverage" existing at the time of the injury. That coverage is not limited to ERISA plans; instead, it includes insurance coverage that is offered by an employer on an individual basis and health coverage offered by an entity that is exempt from ERISA (such as a governmental agency or church). Compare D.C. Code Ann. § 36-301(10) and 36-303 with ERISA Sections 3(1) and 4(b), 29 U.S.C. §§ 1002(1) and 1003(b).[15]

IV. THE *GWBT* DECISION IMPOSES A RESTRICTION ON STATE WORKERS' COMPENSATION LAWS THAT NEITHER ERISA SECTION 514 NOR ITS LEGISLATIVE HISTORY SUPPORT.

From the standpoint of statutory construction, the U.S. Court of Appeals for the District of Columbia's opinion cannot stand because it reads a restriction into ERISA Section 514(a) and Section 4(b)(3) that the plain words and underlying intent of the statute do not support. As the district court below astutely observed, the analysis that the Board of Trade offered, and that the D.C. Circuit later accepted, "infer[s]" a requirement under the ERISA Section 4(b)(3) exemption that the [workers' compensation] plan [may] not in any way refer to another ERISA plan." District Ct. slip op., Appendix to Pet. for Cert. at 27a.

The problem with that inference is that neither ERISA's plain language nor its legislative history support it. To the contrary, the legislative history indicates that Congress "acknowledged and accepted" that no "Chinese wall"

[15] The health coverage referred to in the Act is also narrower than that subject to ERISA. The EAA refers to the employee's "health *insurance* coverage" at the time of the injury, whereas ERISA encompasses both insured and uninsured health plans.

existed "between ordinary ERISA plans and plans maintained solely to comply with workers' compensation laws." Dist. Ct. slip op., Appendix to Pet. for Cert. at 28a (citing *Alessi v. Raybestos-Manhattan, Inc.*). At the time that Congress enacted ERISA, workers' compensation offsets, such as that found in D.C. Code § 36-308(9), were already in existence. *See Myers v. State*, 428 P.2d 83 (Colo. 1967) (ruling on Colorado R.S. Sec. 8-51-101 (1)(d)); *Green v. Stringer*, 389 N.E.2d 510 (Ohio 1978) (ruling on Ohio R.C. 4123.56 [enacted in 1967].[16]

The extensive reach of ERISA preemption suggested by the *GWBT* decision essentially undermines the main objective of workers' compensation programs. Under *GWBT*, workers' compensation statutes in the 50 states and the District would anomalously be prohibited from measuring injured employees' loss of earning power by the total remuneration that the employees were earning at the time of the injury. Any reference to the benefits that the employee was earning would be declared off limits. This is equivalent to saying that workers' compensation statutes can now redress only *part* of the workers' lost earnings.

There is no indication whatsoever that Congress intended ERISA to impose such a restriction on workers' compensation laws. Nor did Congress intend preemption to freeze in time the choices that state legislatures had theretofore made in enacting workers' compensation laws. As Judge Wald pointed out, ERISA's exemptions were not created to serve as barriers to the states' enactment of "innovative" workers' compensation plans. 948 F.2d at 1318 n.1.

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[16] In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981), this Court overturned a state workmen's compensation law that directed ERISA plans to alter *their* benefit formulas.

CONCLUSION

In summary, Congress expressly recognized the states' traditional interest in enacting adequate workers' compensation laws in ERISA Sections 514(a) and 4(b). ERISA Section 514(a) should not be turned around to restrict the authority of the states and the District in measuring the remedies for work-related injuries by an employee's total compensation, including the value of the employee's existing health coverage.

Respectfully submitted,

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